

1. Did the ALJ exceed her jurisdiction by entering an Order following a motion hearing, as opposed to a preliminary hearing? While respondent raises this issue to the Board, this issue was not raised to the ALJ. No objection to the proceedings was raised to the ALJ at the motion hearing.
2. Did the ALJ exceed her jurisdiction under K.S.A. 2005 Supp. 44-510h(b)(1) by appointing a physician when respondent had not been given the opportunity to provide a list of three? Claimant

contends respondent has time and again interfered with the medical care of claimant and has forfeited its right to control the medical care ordered by the ALJ. Respondent argues there is no assertion in this record that the treatment by John P. Estivo, D.O., was insufficient. Therefore, it was not appropriate for the ALJ to allow claimant to designate her own treating physician.

FINDINGS OF FACT

Claimant suffered injury to her left knee on August 30, 2005, when she fell from a stepladder. Claimant was referred to Merrill A. Thomas, D.O., for treatment of a left knee injury. In his office notes of September 1, 2005, and September 7, 2005, Dr. Thomas recommended an MRI on claimant's knee. On September 13, 2005, Intracorp,¹ respondent's insurance carrier, denied the request for the MRI. Dr. Thomas then recommended physical therapy for claimant's knee. Claimant was provided a series of twelve physical therapy sessions. However, when Dr. Thomas requested additional therapy sessions in November 2005, Intracorp responded with a memo dated November 9, 2005, which stated Dr. Thomas's treatment recommendations did not meet established standards of medical necessity. The additional physical therapy was denied.

Claimant was then provided treatment with orthopedic surgeon John P. Estivo, D.O., of Mid Continent Orthopedics. Dr. Estivo first examined claimant on January 16, 2006, and recommended additional physical therapy for claimant's knee. In a memo dated January 20, 2006, respondent again stated the treatment offered claimant by Dr. Estivo did not meet established standards of medical necessity. The requested physical therapy was denied.

In an Order dated January 31, 2006, the ALJ appointed Dr. Estivo as claimant's authorized treating physician, and ordered the additional physical therapy for the left knee as was recommended. In an Order dated April 24, 2006, the ALJ granted claimant's request for temporary total disability and reaffirmed Dr. Estivo's position as the authorized treating physician in this matter. In a letter from claimant's attorney to Dr. Estivo dated April 20, 2006, claimant's attorney indicated that respondent had denied claimant the medical treatment recommended by Dr. Estivo. In an Order dated June 20, 2006, the ALJ appointed Dr. Estivo as claimant's authorized treating physician for the right knee as well as the left knee. Dr. Estivo continued to treat claimant through September 13, 2006, at which time claimant was released post left knee arthroscopy and right knee strain.

¹ Dolgencorp is listed as the insurance carrier, but the heading on the correspondence from the adjuster says Intracorp.

Claimant transferred her employment to a company identified as Envision. She began to experience difficulties again and was referred by claimant's attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for a medical examination on January 4, 2007. As a result of that examination, the ALJ issued an Order dated February 1, 2007, re-authorizing Dr. Estivo to provide care for claimant's injuries. Dr. Estivo examined claimant on February 8, 2007, issuing his report that same date. In that report, Dr. Estivo discussed claimant's ongoing problems, the new job with Envision, and her need for future treatment.

In an ex parte letter to Dr. Estivo dated February 22, 2007, respondent's attorney notified Dr. Estivo that respondent considered claimant's ongoing problems to be unrelated to claimant's employment with respondent and added treatment was no longer authorized.

Claimant filed her E-3 Application For Preliminary Hearing on December 28, 2006. She then filed her Motion To Designate on March 9, 2007, and the matter proceeded to preliminary hearing on April 17, 2007. On April 25, 2007, the ALJ issued an Order designating Pedro A. Murati, M.D., as claimant's authorized treating physician. Also, in both the hearing and the subsequent Order, the ALJ admonished respondent, warning that the medical treatment of claimant was to be determined by the court, and not respondent's utilization review committee. Respondent filed its appeal from that Order.

PRINCIPLES OF LAW

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?²

² K.S.A. 44-534a(a)(2).

It is clear K.S.A. 44-534a and K.S.A. 44-510k provide jurisdiction for an administrative law judge to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.³

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

ANALYSIS

Respondent, in its brief to the Board, argues the ALJ exceeded her jurisdiction by entering an Order following a motion hearing as opposed to a preliminary hearing. This Board Member finds this proceeding was a preliminary hearing held to address the motions filed by claimant. Additionally, a review of the record fails to identify any objection to the proceedings raised in a timely fashion by respondent. As the ALJ was not given the opportunity to rule on this objection, the Board will not address such objections on appeal.

Respondent next objects to the Order of the ALJ appointing Dr. Murati as the authorized treating physician. As is noted above, it is the employer's duty to provide medical treatment after an employee suffers a work-related injury. If the employer fails, it is the administrative law judge's responsibility to then award medical care. Here, the ALJ did just that, on several occasions. And, in response, respondent and its insurance company regularly interfered with that ordered treatment. The admonitions issued by the

³ K.S.A. 2006 Supp. 44-551.

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁵ K.S.A. 44-534a.

ALJ, both at the April 17, 2007 hearing and in the April 25, 2007 Order were, in this Board Member's opinion, entirely justified. This Board Member finds that the ALJ did not exceed her jurisdiction in ordering Dr. Murati as claimant's authorized treating physician.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and respondent's appeal in this matter should be dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 25, 2007, remains in full force and effect, and the appeal by respondent is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Matthew M. Hogan, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge